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Arbitrarily speaking ...

Newsletter of the Association of Arbitrators (Southern Africa)



CHAIRMAN'S LETTER

As we proceed towards the end of another year we normally reflect on what has been achieved during the course of the year. For the Association this has been another busy year albeit members may be unaware of the effort needed to keep the Association running and growing. Fortunately we have had a very stable secretariat for many years ably managed by Dawn Edwards assisted by Di Wattridge.

The EXCO comprises a group of willing workhorses who are frequently tasked with time consuming and onerous jobs for which

there is of course no compensation. Notwithstanding it is very rarely the case that we are short of volunteers for the many and varied demands which arise.

In addition a number of sub committees have operated during the year including the marketing and rules sub committees to ensure that the Association is able to maintain its profile in the marketplace and to continue to strive to achieve excellence

in the practice of arbitration and related dispute resolution fields.

This year has seen a continued demand for the nomination of panels of, alternatively individual, arbitrators. This reflects the growing use of arbitration for the resolution of disputes. Unfortunately this year has also seen an increase in the number of complaints raised

against members of this Association usually arising out of the conduct of matters presided over by our members. This has necessitated the setting

up of a disciplinary "pool" of senior members from whom the Association can draw a disciplinary tribunal comprising three members to hear these complaints. The complaint

process involves offering the person against whom the complaint has been raised the opportunity to make a written submission regarding the complaint and thereafter inviting the parties to participate in a hearing conducted by the tribunal. Sanctions available via the

**NOMINATIONS OF ARBITRATORS
AND ADJUDICATORS CONTINUES TO
INCREASE**

**... THIS YEAR HAS ALSO SEEN AN
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MEMBERS**

Constitution of the Association are limited and my vice Chairman, Judge Fergus Blackie, has been asked to revisit this area of the Constitution with a view to rewriting the relevant section for submission to members in accordance with the requirements to change the Constitution.

**6TH EDITION RULES FOR THE
CONDUCT OF ARBITRATIONS
LAUNCHED**

The 6th edition Rules were also launched earlier this year at a function organised by the Durban branch committee. These Rules will be made available via the web site shortly and members are encouraged to make use of them. The function that was held in Durban to launch the Rules will be repeated in Cape Town probably during February 2010.

Jonathan Mitchell has been tasked with the responsibility for rejuvenating the Western Cape Branch of the Association during 2010, ably assisted by Mrs Michelle Marais and members can look forward to having a number of activities in the Western Cape in the coming year.

A full programme is also being planned for Gauteng and details of this will be published on the web site. The web site itself is being updated and that work is being outsourced to a web design company. Hopefully the results will be reflected in a more user friendly and functional site in the near future. The KwaZulu Natal branch under Alastair Hay's enthusiastic

leadership will no doubt continue to provide local members with informative and entertaining events.

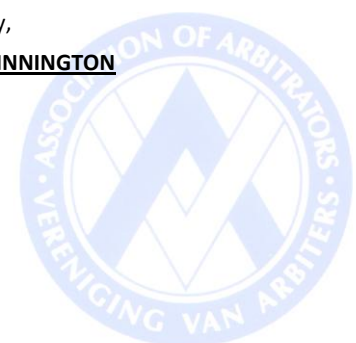
2010 is of course going to be a momentous year for South Africa as it moves towards the World Cup soccer tournament. Dispute adjudication

boards have been appointed for some of the stadia and in others the Association has been the nominating body for individual adjudicators for specific disputes. Adjudication continues to be used increasingly in the construction industry for the settlement of construction disputes. Unfortunately the quality of submissions to adjudication and in many cases the way in which adjudicators manage adjudications reflects a clear lack of understanding of this process and in particular the difference between adjudication and arbitration as a process. The Association will continue to host 1 day courses during 2010 to assist participants in the process to fully understand adjudication.

Finally I wish to extend my best wishes to all members for a peaceful holiday period and to thank the members of EXCO and the secretariat for their support during this very busy year.

Sincerely,

CHRIS BINNINGTON



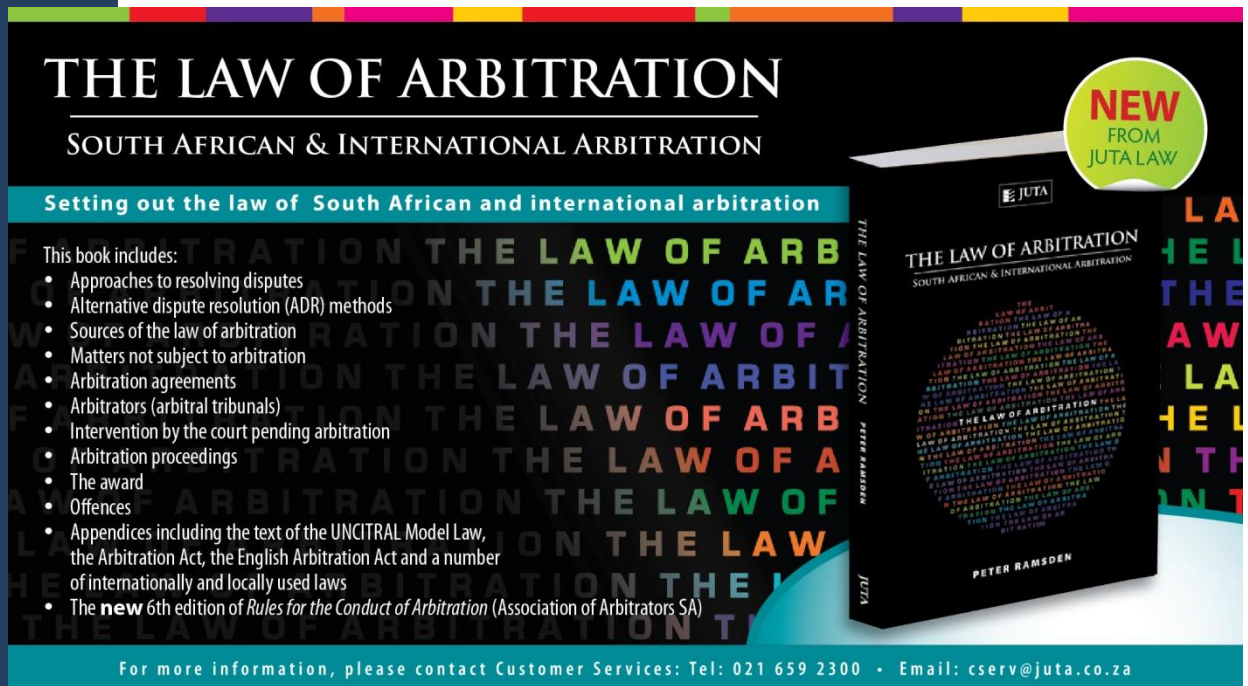
NEW PUBLICATIONS

Juta & Co. Ltd have recently released two new publications which will be of interest to our members.

recently revised by Adv. Peter Ramsden and is now in its 6th Edition.

The first is the revised edition of the well know *McKenzie's Law of Building and Engineering Contracts and Arbitration* which has been

The second, written by the same author, is *The Law of Arbitration, South African & International Arbitration*.



THE LAW OF ARBITRATION
SOUTH AFRICAN & INTERNATIONAL ARBITRATION

Setting out the law of South African and international arbitration

This book includes:

- Approaches to resolving disputes
- Alternative dispute resolution (ADR) methods
- Sources of the law of arbitration
- Matters not subject to arbitration
- Arbitration agreements
- Arbitrators (arbitral tribunals)
- Intervention by the court pending arbitration
- Arbitration proceedings
- The award
- Offences
- Appendices including the text of the UNCITRAL Model Law, the Arbitration Act, the English Arbitration Act and a number of internationally and locally used laws
- The new 6th edition of *Rules for the Conduct of Arbitration* (Association of Arbitrators SA)

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THE JBCC GUARANTEE IS A TRUE DEMAND GUARANTEE

Introduction

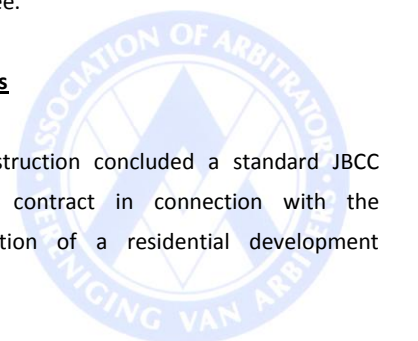
The Eastern Cape High Court in Grahamstown¹ recently added its voice in support of KZN High Court judgments which have upheld the

demand nature of the JBCC construction guarantee.

The Facts

AB Construction concluded a standard JBCC building contract in connection with the construction of a residential development

¹ Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development and Others 2009(5) SA 550 ECG.



known as Furstenburg Grand at the Nahoon Mouth in East London.

In compliance with its obligations in terms of clause 14 of the JBCC agreement, AB Construction arranged for Constantia Insurance Company to provide the requisite construction guarantee in favour of Toasty Trading, the employer under the agreement.

In the relevant clauses of the JBCC agreement it is specified that neither the employer nor the contractor can cancel the agreement if at the time of cancellation the party wishing to cancel is itself in material breach of the agreement.

Foreseeing the probability that Toasty Trading would try and make a claim under the construction guarantee, AB Construction

requested Constantia Insurance Company not to accede to any demand under the guarantee. Constantia explained that it was bound to honour the guarantee unless AB Construction was able to obtain a court interdict prohibiting payment under the guarantee.

AB Construction took up this invitation and applied to the High Court in Grahamstown for a court order interdicting Toasty Trading from making a claim under the guarantee pending the outcome of an arbitration which had been instituted to resolve the disputes between the parties.

EVENING LECTURES

The Association will be presenting a series of informative and interesting evening lectures during the course of 2010.

Fellows, Associates and friends of this Association are asked to diarize these dates. The lectures will be followed by an informal get together where you will have the opportunity to network and discuss the lecture or any other issues you may have with our senior members.

The lectures will be held on:

**24 February 2010
23 June 2010**

**21 April 2010
8 September 2010**

During the course of the contract various disputes arose between AB Construction and Toasty Trading which resulted in Toasty Trading, after issuing an appropriate breach notice, cancelling the agreement.

AB Construction countered by saying that the cancellation by Toasty Trading of the agreement was invalid because Toasty Trading itself had been in breach of the contract pursuant to which AB Construction had issued its own breach notice to Toasty Trading.

The Guarantee

The JBCC construction guarantee constitutes a contract between the guarantor, in this case Constantia Insurance Company, and the employer, Toasty Trading.

The guarantee wording expressly states that it is not a suretyship and nor is it to be construed as an accessory obligation. In other words, liability to make payment under the guarantee

is not dependent on the establishing of a liability on the part of the contractor.

The operative part of the guarantee in the case read as follows:

"... the Guarantor undertakes to pay the Employer the Guaranteed Sum ... upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's physical address calling up this construction guarantee stating that:

- 1. The Agreement has been cancelled due to the Contractor's default and that the construction guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation. ...'*

In this case Toasty Trading had complied with the formalities described.

The Decision

The court agreed with the submissions made by Toasty Trading's counsel that the construction guarantee is analogous to a letter of credit. Letters of credit are well known for recognising that if the formalities stipulated in the letter of credit are met, then there can be no stopping the bank from paying out under the letter of credit in the absence of fraud.

The court held that the disputes between AB Construction and Toasty Trading had nothing to do with the obligation of Constantia Insurance Company to honour the guarantee vis-à-vis the formalities set out in the guarantee for a claim having been complied with. The fact that Toasty Trading's cancellation was disputed by AB Construction and whether or not Toasty Trading was in

material breach at the time of its purported cancellation were considered to be wholly irrelevant to the guarantor's liability to pay.

In the result the court found that Toasty Trading having complied with the requirements of the guarantee and there being no evidence of any fraud, Constantia Insurance Company was obliged to make payment in terms of the guarantee.

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